IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 430

JAMES SAILORS, et al.,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF KENT, et al.,
Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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1. Grand Rapids School District as a Proper Party Plaintiff.

The three judge panel below recognized that the individual plaintiffs had standing to raise the constitutional issues by deciding the case on the merits. Appellees by confining their attack on standing to plaintiff school district-Grand Rapids (Appellees' Motion, pp. 7-9) inferentially recognize the standing of the individual plaintiffs to assert their constitutionally protected rights. Since the Grand Rapids School District is the vehicle through which the one unit vote of 200,000 individual citizens is cast, it has standing and is a proper and necessary party plaintiff. The School District, as well as the individuals, are the victims of arbitrary action of the defendant County Board of Education whose members are perpetuating their self interest.(1) Under such circumstances the School District has standing to raise the constitutional issues.(2)

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(1) Stipulation of Facts, paragraph 15; Appellees' Motion to Dismiss or Affirm, page 6b.

(2) *NAACP v. Alabama*, 357 U.S. 449, page 459 (1958).

2. Validity of Boundary Changes Ordered by the County Board of Education.

The posture of this appeal is governed by the issue unanimously asserted by the three judge court; the applicability of *Gray v. Sanders*. Acceptance of the appeal by this Court is in no way affected by an ultimate decision relating to the boundary changes.

3. Equal Protection at Local Level.

Appellants have heretofore established the shocking contract of the voting power of a resident of the Grand Rapids School District *vis a vis* that of a resident of a rural district. *Reynolds v. Sims*, 377 U.S. 533, and several companion cases have presented no such rank discrimination.

Recognizing that there is really no answer that can be formulated to the stated facts (2,000 to 1 disparity in voting strength) the appellees have chosen to totally ignore the problem. This is accomplished by appellees through the artful process of asserting that appellants really don't have a "constitutional or statutory absolute right to vote" for county school board members (p. 9, Appellees' Motion). This oversimplification, which is just a legalism to deny rights to citizens, overlooks the fact that the equal protection clause is intended to do far more than to protect the *act* of voting or *casting* a ballot. The equal protection clause guarantees equal representation for equal numbers of people and any scheme or device to the contrary, no matter how simple or sophisticated, must fall by the wayside. Georgia was not, constitutionally, required to provide a primary election system for nomination of Democratic candidates for various state-wide offices. Nomination by state convention would obviously be constitutional. Or, constitutionally speaking, the offices could be filled by appointment. But once an election is provided, equal protection must be accorded; invidious discrimination based upon residence within the geographical unit will not be tolerated (*Gray v. Sanders*, 372 U.S. 368). In Tennessee,

constitutionally speaking, there is no mandate that there be a state house of representatives; a unicameral legislature would be constitutional; as would election at large of the house members. But once an election representative body is provided for, elected for districts, invidious discrimination by varrying the size of the districts is a denial of equal protection of the laws (*Baker v. Carr*, 369 U.S. 186). Likewise in Michigan, constitutionally speaking, there is no obligation to create county school districts; their responsibilities could be handled by appointed officials; but once these functions are given to an elected body purporting to represent a certain geographical unit, the election system devised cannot invidiously discriminate because of race, sex, occupation, income or location of one's home within the geographical unit (*Gray v. Sanders*, supra, p. 379). A system which does not provide equal representation for equal numbers of people regardless of the method used to accomplish the result is unconstitutional. *Baker*, *Gray* and *Reynolds* establish that substance not form is important when constitutional rights are involved. The method used in electing county school board members, *in substance*, has the same resulting invidious discrimination condemned in these three cases and the form by which this is accomplished is unimportant.

Appellees' assertion that Michigan conferred no "constitutional or statutory absolute right to vote" for county school board members has been completely answered by this court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The individuals there involved likewise had no "constitutional or statutory absolute right" to remain as residents of the City of Tuskegee, yet the scheme or devise used to exclude them from the city boundaries was invalidated (p. 347):

> "When a state exercises power wholly within the domain of state interest it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

In *Gomillion* the federally protected right was against discrimination based on race or color (Fifteenth Amendment);[3] here the federally protected right is equal protection and against invidious discrimination (Fourteenth Amendment).[4]

The entire three judge panel at the District Court level had no difficulty seeing through form to the substance. The court below rejected these arguments of appellees when all three judges agreed that the primary question was one of whether or not *Gray v. Sanders* applied to the local level of government. The majority was reluctant to so hold without clearer direction from this Court.

Appellees on the other hand because of the force of Judge Fox's reasoning in dissent, and the weight of other authority almost all of which apply *Baker, Gray* and *Reynolds* to local government (see citation of authority in our Jurisdictional Statement) apparently concede, or at least do not care to argue the point, of application of equal protection-apportionment principles to the local level of government.

The diluge of decisions handed down by the lower federal courts and the state courts, which are being supple-

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(3) It should be noted that Justice Whittaker concurred in *Gomillion* on the ground of equal protection under the Fourteenth Amendment, rather than the Fifteenth.

(4) Also see the recent Minnesota case of *Hanlon v. Towley*, Minn., 142 N.W. 2d 741 (1966), where the same argument as to "no absolute right to vote" at the local level of government was emphatically rejected by the Supreme Court of Minnesota by reference to *Gomillion* and the following rationale (p. 745 of 142 N.W. 2d):

> "While it appears to be well within the power of the legislature under Minn. Const. art. 11 to withdraw county government from electoral control and appoint or otherwise designate municipal officials ex officio to exercise the powers delegated to the county without running afoul of the equal protection clause, so long as the present system of a representative form of government is maintained, the fundamental nature of the right to vote inescapably requires the application of fundamental principles. Although not urged by appellants, the fact that the right to vote is granted by statute rather than by our constitution is a distinction without constitutional significance. Once granted, it becomes a fundamental right indigenous to self-government and preservative of other civil and political rights, including the right to equal representation. * * *"

mented by new decisions day by day,[5] make it obvious that some day this Court will have to resolve this conflict which has developed.

In pressing their "Motion to Dismiss" on the presumed basis that "the question on which the decision of the cause depends is so unsubstantial as not to need further argument" the appellees actually repudiate the clear holding of the trial court as to the primary question in this case. All these members of the District Court consider and recognize this as a *Gray v. Sanders* "voting case", thereby rejecting appellees' argument. If they are correct in this (and we submit they are) then it logically follows that there is but on issue remaining: the protection of local government from the autocratic and unrestrained minority control of the majority.

SUMMARY

The words of this Court in 1954 that "today, education is perhaps the most important function of state and local governments" (*Brown v. Board of Education*, 347 U.S. 483, p. 493) is even more applicable in 1966. It follows that democracy at the school board level is as essential as it is in the state house.

This Court has returned democracy to millions of people in this country in the functioning of state government in its holdings in *Baker, Gray* and *Reynolds*. There is no logic in abandoning majorities to the will of minorities at the local level. Frustration of the will of majorities where the people can function most effectively in the solution of their problems on a day to day basis will merely result in ineffective local government yielding to more federal control.

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(5) See *Strickland v. Burns*, D.C. Tenn., no citation available, (decided July 1, 1966), where by a 2-1 vote it was held that equal protection-apportionment principles apply to local school boards in Tennessee. Contrary-wise see *Moody v. Flowers*, D.C. Ala. 256 F. Supp. 195, where by a 2-1 vote it was held that equal protection-apportionment principles did not apply to the Houston County Board of Revenue and Control. Also see *Bailey v. Jones*, S.D., 139 N.W. 2d 385 holding that equal protection-apportionment principles apply to county government.

The reasoning of the majority in its opinion does not involve a refusal to recognize the logic or realities of appellants' claims. As stated by Judge Kent:

> "We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guide lines for the selection of the many boards and commissions created and organized in connection with local government. * * *" (Jurisdictional Statement, p. 2a)

Appellants submit that now is the time for a meaningful mandate to the District Courts to logically implement *Baker, Gray* and *Reynolds*.

We pray review and reversal.

Respectfully submitted,

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